No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The common law does not justify an absolute bar 2

II. As a general rule, probable cause does not bar Section 1983 claims challenging unconstitutional arrests 6

III. This Court should not extend its decision in *Hartman v. Moore* to arrests that violate the First Amendment 9

IV. Imposing an absolute bar on retaliatory-arrest claims is unnecessary to protect officers from meritless claims 14

V. Alternatives to Section 1983 suits do not justify the absolute bar 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 16

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 17-18

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 19, 20

Ballentine v. Las Vegas Metro. Police Dep't,
2017 WL 3610609 (D. Nev. Aug. 21, 2017)..... 15

Bell Atlantic Corp. v. Twombly,
550 U.S. 554 (2007) 17

Bridges v. California,
314 U.S. 252 (1941) 3

City of Houston v. Hill,
482 U.S. 451 (1987) 1

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 21

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 20

Devenpeck v. Alford,
543 U.S. 146 (2004) 13

Dietrich v. John Ascuaga's Nugget,
548 F.3d 892 (9th Cir. 2008) 14

Dinsman v. Wilkes,
53 U.S. (12 How.) 390 (1852) 3, 4

Eberhard v. California Highway Patrol,
2015 WL 6871750 (N.D. Cal. Nov. 9, 2015)..... 15

Fitzgerald v. Barnstable School Committee,
555 U.S. 246 (2009) 22

Fogel v. Collins,
531 F. 3d 824 (9th Cir. 2008) 17

Graham v. Connor,
490 U.S. 386 (1989) 8

Hartman v. Moore,
547 U.S. 250 (2006) 2, 9, 10, 12, 18

Holland v. City of San Francisco,
2013 WL 968295 (N.D. Cal. Mar. 12, 2013) 8

Kilpatrick v. United States,
432 F. App'x 937 (11th Cir. 2001) 15

Los Angeles County v. Humphries,
562 U.S. 29 (2010) 22

Lozman v. City of Riviera Beach,
713 F.3d 1066 (11th Cir. 2013) 5

Malley v. Briggs,
475 U.S. 335 (1986) 16

Mam v. City of Fullerton,
2013 WL 951401 (C.D. Cal. Mar. 12,
2013) 12, 16

Mam v. City of Fullerton,
2014 WL 12573550 (C.D. Cal. July 24, 2014) 8

Manuel v. City of Joliet,
137 S. Ct. 911 (2017) 2

Mihailovici v. Snyder,
2017 WL 1508180 (D. Or. Apr. 25, 2017) 8, 15

Monroe v. Pape,
365 U.S. 167 (1961) 23

Morse v. S.F. Bay Area Rapid Transit Dist. (BART),
2014 WL 572352 (N.D. Cal. Feb. 11, 2014) 12, 15, 16

Mt. Healthy City School District Board ofEducation v. Doyle,
429 U.S. 274 (1977) 9, 12, 14, 18

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 5

N.Y. Times Co. v. United States,
403 U.S. 713 (1971) 3

Owen v. City of Independence,
445 U.S. 622 (1980) 11

Reichle v. Howards,
566 U.S. 658 (2012) 11

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 10

S.H.B. v. State,
355 So. 2d 1176 (Fla. 1977) 20

Scheuer v. Rhodes,
416 U.S. 232 (1974) 11

Staub v. Proctor Hospital,
562 U.S. 411 (2011) 11

Tennessee v. Garner,
471 U.S. 1 (1985) 8

United States v. Armstrong,
517 U.S. 456 (1996) 10

Wayte v. United States,
470 U.S. 598 (1985) 15

Zinermon v. Burch,
494 U.S. 113 (1990) 23

Constitutional Provisions

U.S. Const., amend. I ..... *passim*
U.S. Const., amend. IV ..... *passim*
U.S. Const., amend. XIV 6, 7

Statutes

18 U.S.C. § 241 22
18 U.S.C. § 242 22
42 U.S.C. § 1983 ..... *passim*
Fla. Stat. § 871.01(1) 12, 20

Other Authorities

Boghani, Priyanka, *Is Civilian Oversight the Answer to Distrust of Police?* Frontline Newsletter, July 13, 2016 23
Chafee, Zechariah, Free Speech in the United States (1941) 3
Emerson, Thomas, The System of Freedom of Expression (1970) 3
Jackson, Robert H., The Federal Prosecutor (1940) 13
Norman, Bob, *Targeting Citizen Lozman*, Broward/Palm Beach New Times, Dec. 13, 2007 6
Restatement (First) of Torts (1934) 4

REPLY BRIEF FOR PETITIONER

Respondent does not dispute that "one of the principal characteristics by which we distinguish a free nation from a police state" is the "freedom of individuals verbally to oppose or challenge" government policies "without thereby risking arrest." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). And the United States acknowledges that a First Amendment violation occurs "whenever an official retaliates against an individual for having engaged in protected speech," including when that retaliation takes the form of an arrest for which "probable cause exists." U.S. Br. 8.

Nevertheless, both respondent and the United States assert that probable cause categorically bars Section 1983 damages lawsuits to remedy arrests that violate the First Amendment. To support that argument, respondent throughout its brief focuses on times when officers in the field can reasonably consider an individual's expression in deciding whether to arrest. *See, e.g.*, Resp. Br. 19-23, 26-31, 39, 42.

But the case before the Court (and similar examples offered by *amici*) involves an entirely different kind of arrest and shows the grave constitutional harm of an absolute bar. The defendant here is not an individual officer; it is a municipality. The arrest did not occur in the field; it occurred while petitioner was calmly speaking during the public comment portion of a city council meeting. The protected expression—a lawsuit against the city and "outspoken critic[ism]" of city officials and policies in previous weeks and months, Pet. App. 2a—provided no basis for arrest. A

federal court held that there was no probable cause for the only offenses with which petitioner was ever charged. J.A. 105, 108. Respondent's defense to liability here rests entirely on its midtrial unearthing of an obscure misdemeanor provision.

While probable cause for an underlying arrest can have probative force in a First Amendment retaliation suit, this Court should hold—at least in cases such as this—that it is not dispositive as a matter of law.

I. The common law does not justify an absolute bar.

1. Last Term, this Court again cautioned against plucking "'prefabricated components'" from common-law torts to "control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). That is just what respondent does here.

Common-law doctrines regarding false arrest may provide a useful starting point in understanding Fourth Amendment constraints on arrests because both bodies of law address whether a person's conduct provides grounds for seizing him.

But the relevant *First* Amendment interest is not directed at arrests; rather, it condemns the use of governmental powers to inflict any form of official reprisal for protected expression. Neither respondent nor the United States actually claims that the common law has anything to do with what counts as a First Amendment violation. Rather they ask this Court to restrict a federal statutory remedy: the "action at law" provided by 42 U.S.C. § 1983. This Court should not limit that remedy by borrowing "elements," Resp. Br.

15, from tort causes of action not directed at free speech wrongs.

2. The First Amendment actually represents a repudiation of common-law doctrine. At common law, criticism that threatened to undermine respect for the government or public officials constituted the crime of seditious libel. But as this Court explained in *Bridges v. California*, 314 U.S. 252 (1941), "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Id.* at 264 (citation omitted). The First Amendment "was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be." *N.Y. Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) (citing Thomas Emerson, The System of Freedom of Expression (1970) and Zechariah Chafee, Free Speech in the United States (1941)).

3. In any event, the common law is far more ambiguous than respondent acknowledges. Respondent and the United States offer two common-law analogs: malicious prosecution and false arrest. Resp. Br. 16; U.S. Br. 9. It is fair to say that in malicious prosecution cases, the presence of probable cause means the action "will not lie." *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *see* Resp. Br. 16-17; U.S. Br. 9-10, 24-25. But in *Dinsman*—the case the United States identifies as stating this Court's understanding of the common law, U.S. Br. 25—the Court squarely refused to impose that bar on false imprisonment claims. Such a bar was "not of a character to recommend it to favor." *Dinsman*, 53 U.S. at 402. Instead:

> Probable cause or not is of no further importance than as evidence to be weighed by [the jury] in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

Dinsman, 53 U.S. at 402. That mirrors the rule petitioner proposes: Probable cause is relevant to determining whether a Section 1983 defendant acted from retaliatory animus and whether the plaintiff would have been arrested absent that animus. But when the evidence shows that the arrest would not have occurred but for the defendant's desire to punish or deter protected speech, probable cause cannot absolutely bar suit. Petr. Br. 35-37.

4. Nor does the Restatement of Torts justify an absolute bar. The section on which respondent and the United States rely provides that "[t]he arrest of another is *not privileged* unless the actor makes the arrest *for the purpose* of bringing the other before a court, body or official or otherwise securing the administration of the law." Restatement (First) of Torts § 127 (1934) (emphasis added). The City and the United States fasten on an illustration that could arguably support a privilege in *mixed* motive cases. *See* Resp. Br. 16-17; U.S. Br. 24-25.

But the next illustration limits the scope of the privilege, stating that if an officer arrests a thief "to force [him] to restore the goods to [the victim] and not to bring [him] before a magistrate for commitment," then the arrest is *not* privileged. *Id.* § 127 cmt. a., illus. 2. Thus, the common law would not privilege catch-and-release arrests designed not to "secur[e] the

administration of the law" but instead to harass individuals for their protected expression or to prevent journalists from covering a story. *Amici* have pointed to numerous examples of this practice. *See* Br. of First Amendment Found. 10-18; Br. of Inst. for Free Speech 7-16; Br. of Nat'l Press Photographers Ass'n 8-17.

If probable cause provides no privilege in tort cases for arrests that accomplish even legitimate government purposes like restitution, there is even less justification for this Court to invent a privilege in Section 1983 cases for arrests used for the constitutionally forbidden goal of punishing, preventing, or deterring protected expression.

5. For all its attachment to the common law, respondent seems unaware of how closely its brief echoes the repudiated doctrine of seditious libel. Respondent accuses petitioner of using the public comment period "to air grievances against City leadership, almost always making vague accusations of corruption," Resp. Br. 1. It points to occasions on which petitioner offered the kind of "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), that the First Amendment protects but the common law punished. *See* Resp. Br. 3 (describing some of those comments). Left unmentioned in respondent's self-congratulatory account of its forbearance is its contemporaneous attempt to evict petitioner and his floating home from its marina. A jury ultimately found that petitioner's "protected speech was a substantial or motivating factor" behind that attempt. *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1070 (11th Cir. 2013).

Respondent's account also reinforces petitioner's claim that his arrest was the product of animus against his protected expression. Councilmember Wade was not the only official who "vented" her "frustrat[ion]" that petitioner had exercised his Petition Clause right to sue the City. Resp. Br. 2. The Council's discussion of that lawsuit (which this Court can read for itself, J.A. 150-183) is marbled with expressions of anger. For example, two other councilmembers suggested hiring a private detective, in part to investigate petitioner's contact with Governor Bush (contact itself protected by the First Amendment). *See* J.A. 173-74, 181. When a reporter asked her about the transcript, Wade doubled down:

> I told him that I would put my foot so far up his behind he would think my toe is his tonsil. I ain't going to pay nobody to kill him. But if he gets into my face, I will get him out of it.

Bob Norman, *Targeting Citizen Lozman*, Broward/Palm Beach New Times, Dec. 13, 2007, https://tinyurl.com/17-21RB2; *see* Tr. 29-30 (11/17/2014), ECF No. 770.

This Court should not interpret Section 1983 to allow jurisdictions to accomplish through arrests that violate the First Amendment what they can no longer accomplish through seditious libel prosecutions.

II. As a general rule, probable cause does not bar Section 1983 claims challenging unconstitutional arrests.

1. Respondent recognizes that probable cause does not bar *Fourteenth* Amendment-based Section 1983 damages lawsuits challenging an arrest. Indeed, respondent has conceded that the very sort of arrest at

issue here—"an arrest motivated by protected speech"—can "constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim." BIO 21. It still has not explained why, if this is so, such suits are barred when they are pursued under the First Amendment. *See* Petr. Reply 12.

Nor is there a relevant distinction between considering race and considering expression. Police officers can sometimes legitimately take race into account—for example, in deciding whether an individual matches the description of a suspect—but cannot base their arrest decisions on animus against individuals of a particular race. So, too, police officers can sometimes "permissibly consider speech in deciding whether to arrest," U.S. Br. 20 n.6; *see also* Petr. Br. 33-34; Resp. Br. 46, but cannot base arrest decisions on animus against protected speech. In petitioner's case, for example, respondent does not suggest that Councilwoman Wade's "frustrat[ion]" with petitioner's protected expression, Resp. Br. 2, could justify his arrest.

Furthermore, respondent is wrong in perceiving an "objective safeguard[]" that differentiates equal protection claims from First Amendment ones, Resp. Br. 46. Respondent asserts that equal protection challenges to an arrest require identifying similarly-situated individuals of another race "against whom the government did not enforce the law." *Id.* At least with respect to arrests, respondent has confused an evidentiary issue with a substantive one. When there is no direct evidence of an arresting officer's racially discriminatory motive, showing that persons of other races were not also arrested may be practically necessary to prove a discriminatory purpose. But surely if

an officer's body camera captures him announcing "I don't like Latinos, and that's why I'm arresting you," the arrestee could prevail without marshaling evidence about the officer's other arrests. A similar rule should govern First Amendment retaliation cases. *See* Br. of MacArthur Justice Ctr. 17-18 (describing officers recorded discussing how to justify arresting a protester).

2. Not even all *Fourth* Amendment Section 1983 lawsuits face an absolute bar like the one respondent proposes here. Excessive use of force that violates the Fourth Amendment can support a Section 1983 damages suit "notwithstanding the existence of probable cause to arrest." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985).

The treatment of excessive use of force cases further erodes the City's officer-protection-above-all rationale for an absolute bar. Three of the six Section 1983 cases respondent chose as poster children for the necessity of the bar also included excessive force claims that would have gone to trial in any circuit. *See* Resp. Br. 26-30 (citing *Mihailovici v. Snyder*, 2017 WL 1508180, at *4 (D. Or. Apr. 25, 2017); *Mam v. City of Fullerton*, 2014 WL 12573550, at *1 (C.D. Cal. July 24, 2014); and *Holland v. City of San Francisco*, 2013 WL 968295, at *4-5 (N.D. Cal. Mar. 12, 2013)). In the face of this reality, respondent can state no principled or pragmatic reason for extinguishing claims under the First Amendment.

3. Respondent denies that it conflates the Fourth and First Amendments and insists that its rule is respectful of First Amendment "values." Resp. Br. 34-39. But the cause of action it embraces provides no protection for First Amendment *rights*. A plaintiff who

proves that he was arrested without probable cause has already established liability under Section 1983 on a Fourth Amendment claim. The only thing respondent's "First Amendment" cause of action does is to add further hurdles to a plaintiff: He must also show protected speech, animus, and causation, at which point the defense can still prevail.

A rule that requires judgment be entered for the defense even when the government concedes that it would not have pursued an arrest had the citizen not spoken out is not an "of course imperfect" implementation of the First Amendment, Resp. Br. 36. It is a betrayal.

III. This Court should not extend its decision in *Hartman v. Moore* to arrests that violate the First Amendment.

Contrary to the arguments advanced by respondent and the Government, the differences between suits alleging retaliatory prosecutions and ones alleging retaliatory arrests outweigh the similarities. In fact, arrest cases are really no different than the kinds of cases regularly adjudicated under the "standard" First Amendment retaliation framework, U.S. Br. 2, laid out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

1. Respondent and the United States misunderstand why *Hartman v. Moore*, 547 U.S. 250 (2006), imposed a no-probable-cause requirement on retaliatory-prosecution claims.

It was not because evidence of probable cause is readily available and probative, U.S. Br. 11; Resp. Br. 33. To the contrary, the Court stated that "[t]his alone

does not mean, of course, that a *Bivens* or § 1983 plaintiff should be required to plead and prove no probable cause." *Hartman*, 547 U.S. at 261.

Rather, the Court's decision flowed from the values that undergird absolute prosecutorial immunity. *See Hartman*, 547 U.S. at 262. The Court's use of *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), and *United States v. Armstrong*, 517 U.S. 456 (1996), to explain the "distinct problem of causation" shows that the problem stems from the need to avoid inquiring into prosecutorial decisionmaking, *Hartman*, 547 U.S. at 263.

But a Section 1983 retaliatory-prosecution suit against even a "nonprosecutor" can undermine prosecutorial immunity, because winning requires showing how the vengeful nonprosecutor "influence[d]" the prosecutor's decision to proceed, *Hartman*, 547 U.S. at 262. Even these suits will involve precisely the inquiry into prosecutorial decisionmaking that absolute immunity is designed to forestall: the parties in the Section 1983 suit are almost sure to seek information from the "the prosecutor's mind," *id.* at 263, and his files to prove (or rebut) causation. This Court was willing to permit Section 1983 suits to proceed if plaintiffs can plead and prove the absence of probable cause because then the claim can be litigated without intruding on prosecutorial decisionmaking. The lack of probable cause provides a "prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." *Id.* at 265. In short, absolute prosecutorial immunity is the explanation for why the Court struck the balance it did in *Hartman*.

But absolute prosecutorial immunity plays no role whatsoever in retaliatory-arrest cases. The individual government defendants lack absolute immunity; they possess only qualified immunity. *See Scheuer v. Rhodes*, 416 U.S. 232, 245-48 (1974). Municipal defendants like respondent enjoy no immunity at all. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And arrest decisions are the quintessential example of a decisionmaking process that is opened up to scrutiny every day.

2. The causation problem is not "even greater" in retaliatory-arrest cases than in retaliatory-prosecution cases, Resp. Br. 32.

To the contrary: In suits where the arresting officer is alleged to harbor the retaliatory animus, there is "no [causal] gap to bridge" at all. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment). And even in cases where the defendant is an official (or a municipality) that is alleged to have caused the arrest, there is no distinctive causation problem.

Cases like petitioner's are on all fours with employment discrimination cases based on a "cat's paw" theory. *See, e.g., Staub v. Proctor Hospital*, 562 U.S. 411 (2011). In those cases, liability attaches to an employer when a supervisor's animus leads a human resources department acting on his recommendation to fire an employee. *See id.* at 418-22. Federal courts regularly adjudicate those cases without any apparent difficulty.

The causal chain in petitioner's case is similar. Petitioner alleged that a vengeful city official directed a policeman to arrest him. The fact that the arresting

officer acted without a retaliatory motive of his own spares him from liability. But it should not spare respondent.[1]

Furthermore, respondent compares apples and oranges when it contrasts "the typical *arrest*"—"a one-off, highly charged encounter"—with the "typical *Mt. Healthy case*," Resp. Br. 43 (emphasis added). In fact, retaliatory-arrest *cases* quite often fit respondent's description of litigation under *Mt. Healthy*. For example, petitioner had a "long-term relationship" with the Riviera Beach City Council, *id.*, "one giving rise to considerable evidence of intent—including a paper trail," *id.* And in many cases—including ones identified by respondent itself—there is a "set of similarly situated suspects for ready comparison," *id.* at 44. *See Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. Mar. 12, 2013) (Resp. Br. 27); *Morse v. S.F. Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, at *9-10 (N.D. Cal. Feb. 11, 2014) (Resp. Br. 28).

3. Of course, evidence regarding probable cause can be *relevant* in retaliatory-arrest cases. Petr. Br. 35-37. But petitioner has already explained why *Hartman*'s pleading and proof requirements are unfair and unworkable here. *Id.* at 46-48. Petitioner's concern is hardly "unfounded," Resp. Br. 52; *see* U.S. Br. 14-15, given his experience. For eight years after his arrest, no one had any idea that Section 871.01(1) of the Florida Statutes might bear on his First Amendment claim. Indeed, until respondent stumbled across that statute midway through the trial, petitioner had a

---

[1] Respondent has abandoned any argument before this Court that municipal liability doctrine should bar petitioner's claim.

winning Fourth Amendment claim as a matter of law, and no bar against his First Amendment claim either. *See* Petr. Br. 9-10. (The Eleventh Circuit's absolute bar, which respondent seeks to nationalize, did not prevent *petitioner's* case from going to trial.) How should petitioner be expected to know more about the law than the officials who arrested him and the attorneys who sought to justify his arrest? Thus, respondent is wrong to claim that *Devenpeck v. Alford*, 543 U.S. 146 (2004), provides an "important limitation" on retaliatory arrests, Resp. Br. 47. To the contrary, it licenses an arrest-now-and-hope-to-find-some-offense-later strategy.

4. Finally, respondent is wrong to suggest that "arrests backed by probable cause pose little danger to the freedom of speech." Resp. Br. 38. As petitioner has already explained, when the government "pick[s] the man and then search[es] the law books," it can nearly always find *some* crime for which there is probable cause. Petr. Br. 22 (quoting Robert H. Jackson, The Federal Prosecutor 4-5 (1940)). There are precious few of us who never jaywalk, take computer paper home from the office, or exceed the speed limit. Petr. Br. 23. Government animus against protected expression is fortunately rare. But when it exists, the probable cause requirement is no real restraint at all. There will be opportunities enough to engage in arrests that satisfy the Fourth Amendment even if they violate the First.

IV. Imposing an absolute bar on retaliatory-arrest claims is unnecessary to protect officers from meritless claims.

Respondent claims that the absolute bar rule is necessary to protect police officers against meritless claims. Not so. Along with the framework laid out in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), this Court's decisions regarding qualified immunity and pleading standards provide the protection reasonable government actors deserve. Experience confirms the workability of an approach where probable cause has probative force, but "is not dispositive." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). It is telling that only two of the nine states in the circuit which has used petitioner's proposed rule for at least a decade have chosen to appear as *amici* in support of respondent.

1. Respondent and the Government would have this Court believe that the typical First Amendment retaliatory-arrest claim involves a line-level police officer in the field who had to make a near-instantaneous decision whether to arrest someone to "prevent[] a massacre," Resp. Br. 7, and where the suspect's arguably protected expression "bear[s] directly on the probable cause determination." U.S. Br. 19; *see* Resp. Br. 19-23.

It is unclear why they think that. Petitioner's case, for example, matches literally *none* of those features (which might explain why neither respondent nor the Government ever explains why their proposed rule *should* bar suits like his). *See supra* at 1-2. Nothing about his case required split-second decisionmaking regarding anything like "a risk to the

public," "a danger to the victim," or "a danger to the officer." Resp. Br. 20.

When respondent turns to actual Section 1983 suits, as opposed to stylized "examples" only "modeled" on reported cases, Resp. Br. 20,[2] it offers precious few instances of line-level officers being subjected to trial on meritless retaliatory-arrest claims. Respondent's cherry-picked sample of six cases (drawn from a half-decade of litigation in the Nation's most populous Circuit), proves the point. *See* Resp. Br. 26-30 (listing the cases).

Of respondent's six cases, three did not present retaliatory-arrest claims against line-level officers who had made decisions in the field. *See Ballentine v. Las Vegas Metro. Police Dep't*, 2017 WL 3610609, at *4 (D. Nev. Aug. 21, 2017) (arrest pursuant to criminal complaint); *Mihailovici v. Snyder*, 2017 WL 1508180, at *1-2 (D. Or. Apr. 25, 2017) (police chief); *Morse v. S.F. Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, at *2 (N.D. Cal. Feb. 11, 2014) (deputy police chief). Three involved arrests preceded by weeks or months of protected First Amendment expression, and the courts pointed to *this* expression—not expression coincident with the arrest—as the source of the retaliatory animus. *See Ballentine*, 2017 WL 3610609, at *1-4; *Eberhard v. California Highway Patrol*, 2015 WL 6871750, at *7 (N.D. Cal. Nov. 9, 2015); *Morse*, 2014 WL 572352, at *9. And two involved evidence that the

---

[2] Several of respondent's examples are not even based on cases involving arrests. *See, e.g., Kilpatrick v. United States*, 432 F. App'x 937 (11th Cir. 2001) (per curiam) (traffic stop); *Wayte v. United States*, 470 U.S. 598 (1985) (indictment).

plaintiff was singled out for arrest from among otherwise similarly situated individuals because he was engaged in protected First Amendment activity. *See Morse*, 2014 WL 572352, at *9-10; *Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. Mar. 12, 2013). If these are the most persuasive examples respondent can offer, the absolute bar rule is a solution without a problem.[3]

2. Even when it comes to officers in the field, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It strikes the proper balance between ensuring the "vindication of constitutional guarantees" and the risk of "*unduly* inhibit[ing] officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (emphasis added).

Respondent is simply wrong that if this Court rejects the Eleventh Circuit's absolute bar, "qualified immunity will no longer do any work," Resp. Br. 55. Of course, qualified immunity will not protect blatantly vengeful officers. Nor should it, if the First Amendment protection against retaliatory arrests is to mean anything.

But qualified immunity will still be available in cases where it is not clearly established that particular speech is protected or in cases where it is not unreasonable for officers to have taken particular protected speech into account. An officer need not "psychoanalyze himself" to determine whether he was

---

[3] Nor would an absolute bar even have spared the defendants a trial in the three cases where the plaintiffs also had triable excessive-use-of-force claims. *See supra* at 8.

"considering speech in a good way or a bad one." Resp. Br. 42-43.

Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008), shows how. The plaintiff challenged his arrest because it was based in part on his van's bearing the words "A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!" with "W.O.M.D. ON BOARD." *Id.* at 827. While the court determined that this speech was not a true threat, it nonetheless granted the officers qualified immunity because under the circumstances it was unclear whether "all reasonable officers would have concluded that Fogel's speech was protected by the First Amendment," *id.* at 834.

By contrast, the absolute bar rule swings way too far in the other direction. It would immunize policemen from Section 1983 liability even if they admit that disapproval of protected expression was the only reason they enforced an otherwise never-used statute. It would immunize higher-level officials from Section 1983 liability even if they admit that they directed an arrest in order to punish the arrestee for prior protected expression or to deter future criticism. And it would immunize municipalities from Section 1983 liability even though this Court has refused to extend any form of immunity to municipal defendants. That cannot be right.

3. Pleading rules also weed out meritless First Amendment claims. A Section 1983 plaintiff must do more than plead facts that are "merely consistent" with retaliation for a complaint to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557 (2007). A conclusory allegation of animus is insufficient; there must be sufficient factual detail in the complaint to make the existence of animus "plausible"

to a court "draw[ing] on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Moreover, the *Mt. Healthy* framework requires proof of retaliatory "animus" toward protected speech, *Hartman v. Moore*, 547 U.S. 250, 260 (2006), not simply consideration of such speech. Thus, it is not enough for a plaintiff to allege merely that he was engaged in protected speech at the time of his arrest.

Cases will quickly get knocked out absent either plausible allegations that government officials directly expressed animus or sufficiently detailed allegations regarding a course of dealing between the plaintiff and the government that provides strong circumstantial evidence of hostility to the substance of the plaintiff's First Amendment activity. In petitioner's case, for example, the transcript from the closed-door session was indispensable to withstanding respondent's motion for summary judgment. *See* Pet. App. 17a-18a, 31a-32a. Such probative evidence of animus—and therefore, the universe of cases that will proceed—is rare indeed.

V. Alternatives to Section 1983 suits do not justify the absolute bar.

Respondent and its *amici* claim that Section 1983 damages suits for retaliatory arrests are unnecessary because there are "numerous" other "barriers to the kinds of arrests that Lozman fears." Resp. Br. 48; *see also* Br. of D.C. 16-24 ("D.C. Br,"); Br. of Nat'l Ass'n of Counties 11-17 ("NAC Br."); U.S. Br. 26-30. The amount of space they devote to this issue implicitly concedes the need to deter arrests that violate the First Amendment, even if those arrests do not violate

the Fourth Amendment as well. But none of the alternatives they identify comes anywhere close to a meaningful substitute for Section 1983 suits.

1. Respondent is wrong to suggest that practical considerations will prevent retaliatory arrests, Resp. Br. 48-49.

It may be true, as a general matter, that police departments will not make arrests for petty offenses when the costs of doing so "are simply too great to incur without good reason." Resp. Br. 48 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001)). But retaliatory animus provides such a reason. Respondent does not dispute, nor can it, the harm an arrest inflicts on the person arrested or the chilling effect of arrests on the public. Petr. Br. 23-25. So even if a retaliatory arrest is not logistically costless, an official who dislikes protected expression may be willing to incur those costs in order to inflict a particularly potent form of retaliation.

Moreover, many retaliatory arrests never effectively get "beyond booking," Resp. Br. 48. Indeed, a number of the cases discussed by petitioner's *amici* involve so-called catch-and-release arrests, in which individuals are freed before any formal processing at all. *See supra* at 4-5; Pet. App. 4a-5a. The "costs" respondent identifies thus provide no real barrier or deterrent to using arrests as a tool for retaliation.

What is more, respondent's exclusive focus on line-level actors leaves it silent with respect to the cost-benefit calculus confronting municipalities and higher-level officials. After all, Councilwoman Wade did not have to process petitioner's arrest. Her entire involvement occupied only seconds of her time.

In fact, "the political accountability" of "local lawmakers and law-enforcement officials," Resp. Br. 48 (quoting *Atwater*, 532 U.S. at 353), actually undermines the City's argument. No doubt Dr. Martin Luther King Jr.'s arrest for speeding was popular with the people who elected segregationist public officials. "An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring).

2. Nor does vagueness doctrine provide an "appropriate antidote" to the risk of retaliatory arrest, Resp. Br. 49.

First, a government does not have to rely on vague statutes to effect pretextual arrests of people whose protected expression it does not like. (A prohibition against jay-walking is both very clear *and* ripe for abuse).

Second, contrary to respondent's argument, Resp. Br. 49, many broad statutes that are amenable to retaliatory enforcement are not *unconstitutionally* vague. The statute involved here is an example. The Florida Supreme Court adopted a construction of Section 871.01(1) designed to avoid First Amendment problems. *S.H.B. v. State*, 355 So. 2d 1176, 1178 (Fla. 1977). Even if finding probable cause for petitioner's arrest requires reading Section 871.01(1) aggressively, the statute is not unconstitutional on its face.

3. To the extent respondent floats the notion that suits for injunctive relief can do the work that damages claims otherwise perform, Resp. Br. 47, it is mistaken.

This is a lesson of *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). There, this Court held that an individual lacks standing to seek injunctive relief even after he has been subject to an unconstitutional policy (for Lyons, the unjustifiable use of a deadly chokehold) unless he can show he will be subjected to a future *unconstitutional* use of the same practice. Thus, as long as *some* future arrest of the plaintiff under *some* criminal statute would comport with the First Amendment, a plaintiff would lack standing to seek injunctive relief against retaliatory arrests as a category.

Trying to map the contours of an injunction against retaliatory arrests shows why the prospect of combatting First Amendment violations this way is a pipe dream. What is the injunction to say? "Do not arrest the plaintiff for a crime [or perhaps for a specific list of crimes], even if you have probable cause, when animus against his protected expression is a but-for cause of the arrest in the sense that an individual who has not engaged in such protected expression would not be arrested"? Does the injunction bind all the officers in a particular department? All officials who have the power to direct an arrest? And how is such an injunction to be enforced? Through a contempt proceeding? Against whom? If respondent is anywhere near right about the cost to officer performance of damages lawsuits, it is worth remembering that in a Section 1983 damages action, the officer is protected by both qualified immunity and indemnification; a person accused of contempt has neither.

To the extent respondent is right that a court could "certainly enjoin" an unconstitutional policy even if damages are unavailable, Resp. Br. 47, it could

certainly entertain a suit for damages as well. In *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), this Court declared that "[n]othing in the text of § 1983" suggests that "§ 1983's elements" should "change with the form of relief sought." *Id.* at 37. If respondent is willing to countenance suits for injunctive relief without insisting on a lack-of-probable-cause element—and it is—then it must also accept damages suits without insisting on such an element. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253, 256 (2009) (refusing to displace Section 1983's damages remedy absent clear evidence of congressional intent).

4. Nor, contrary to the suggestion floated in the Government's brief, do federal criminal prosecutions under 18 U.S.C. §§ 241 and 242 "mitigate[]" the "possibility that officers may engage in retaliatory arrests notwithstanding the existence of probable cause." U.S. Br. 28. It is telling that the United States points to not a single case in which the Department of Justice has brought a prosecution against any police officer, let alone any other official, for arresting (or causing the arrest of) an individual in retaliation for the exercise of First Amendment rights.[4]

5. Finally, all the citations, by the United States and other *amici*, to potential remedies for unconstitutional arrests provided by state law or municipal policy, are entirely beside the point. *See* U.S. Br. 29 n.7; D.C. Br. 16-24; NAC Br. 11-17.

---

[4] This is not because the Department is unaware that police departments retaliate against protected expression. *See* Pet. 17 (citing the Department's recent findings regarding the Baltimore Police Department); Br. of MacArthur Justice Ctr. 3-5, 8-9 (other DOJ reports).

First, the fact that police departments "have established procedures for receiving and processing citizen complaints," NAC Br. 15; *see* D.C. Br. 17-20, cannot justify an absolute bar. The 200 civilian oversight boards nationwide are "still just a fraction compared to the nearly 18,000 law enforcement agencies across the United States." Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?*, Frontline Newsletter, July 13, 2016, https://tinyurl.com/17-21RB1.

And those entities have no role whatsoever in disciplining or deterring government officials outside law enforcement agencies whose retaliatory animus impels them to direct officers to make arrests.

More fundamentally, this Court could not have been clearer in its landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which "rejected the view" that Section 1983 "does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). It is simply "no answer" to a Section 1983 damages claim "that the State has a law which if enforced would give relief." *Monroe*, 365 U.S. at 183.

Still less can state laws that *do not* provide relief defeat a Section 1983 damages claim. It is telling that although the National Association of Counties lists all fifty states' parallels to the First Amendment, NAC Br. at 11 n.10, it does not offer any evidence that state law has provided effective remedies to individuals subjected to retaliatory arrests. If the presence of practical considerations, potential criminal liability, and state-law correctives do not immunize other constitutional challenges to arrests from scrutiny under Section

1983—and they do not—then they should not preclude First Amendment-based suits either.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

February 16, 2018